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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re:

PG&E CORPORATION

- and -

**PACIFIC GAS AND ELECTRIC
COMPANY,**

Debtors.

- ☐ Affects PG&E Corporation
☐ Affects Pacific Gas and Electric
Company
☒ Affects both Debtors

**All papers shall be filed in the Lead Case,
No. 19-30088 (DM)*

Case No. 19-30088 (DM) (Lead Case)
Chapter 11
(Jointly Administered)

**JH KELLY LLC'S MOTION FOR
PERMISSION TO WITHDRAW PROOF
OF CLAIM (WITH PREJUDICE)**

Date: August 23, 2022
Time: 10:00 a.m. (PT)
Place: United States Bankruptcy Court
Courtroom 17, 16th Floor
San Francisco, CA 94102

Objection Deadline:

August 16, 2022, at 4:00 p.m. (PT)

**TO THE COURT, TO DEBTORS PG&E CORPORATION AND PACIFIC GAS AND
ELECTRIC COMPANY, AND TO THE OFFICIAL COMMITTEE OF UNSECURED
CREDITORS AND THE OFFICIAL COMMITTEE OF TORT CLAIMANTS APPOINTED
IN THESE JOINTLY ADMINISTERED CASES:**

JH Kelly, LLC ("**JH Kelly**"), by and through its undersigned attorneys of record, hereby
moves pursuant to Federal Rule of Bankruptcy Procedure 3006 for permission to withdraw with

1 prejudice its proof of claim filed in the above-captioned jointly administered bankruptcy cases (the
2 “*Bankruptcy Cases*”) identified as claim number 76606 (the “*Proof of Claim*”).

3 I. JURISDICTION AND VENUE

4 The Court has jurisdiction over this motion pursuant to 28 U.S.C. § 157(b)(2)(A), (B), and
5 (O) and 28 U.S.C. § 1334. Venue is proper in this Court pursuant to 28 U.S.C. § 1409(a).

6 II. FACTUAL AND PROCEDURAL HISTORY

7 The Proof of Claim and its proposed withdrawal relate to a recently settled payment dispute
8 between JH Kelly and AECOM Technical Services, Inc. (“*AECOM*”) arising out of a project for
9 Pacific Gas and Electric Company (“*PG&E*”). The history of the dispute is set forth below in
10 Part A, JH Kelly’s participation in the Bankruptcy Cases in Part B, and the settlement between
11 JH Kelly and AECOM—and its effect on PG&E—in Part C below.

12 A. The Litigation Among JH Kelly, AECOM and PG&E Concerning the Burney Project

13 In February 2016 AECOM entered into an agreement with PG&E for work on a project
14 known as the “Burney K2 Replacement Project” at PG&E’s Burney Compressor Station located in
15 Burney, California (the “*Project*”). AECOM later entered into a subcontract with JH Kelly to
16 perform construction services on the Project; there is no direct contractual relationship between JH
17 Kelly and PG&E relating to the Project.

18 During the course of the Project there were substantial delays, payment disputes, and cost
19 overruns and, on November 1, 2018, JH Kelly recorded a mechanics lien against the Project in the
20 amount \$15,881,776.21 (the “*JH Kelly Lien*”).

21 In January 2019, JH Kelly filed two actions in Shasta County Superior Court: (i) one against
22 PG&E for foreclosure of the JH Kelly Lien titled *JH Kelly, LLC v. Pac. Gas & Elec. Co.*, Case No.
23 CV-19-191759 and (ii) another for money damages against AECOM titled *JH Kelly, LLC v.*
24 *AECOM Technical Services, Inc.*, Case No. CV-19-192600 (together, the “*State Court Actions*”).

25 On January 29, 2019, following commencement of the State Court Actions, both PG&E and
26 PG&E Corporation (together, the “*Debtors*”) commenced the Bankruptcy Cases.

27 The State Court Actions were subsequently stayed; removed to the U.S. Bankruptcy Court
28 for the Eastern District of California; transferred to this Court, where they were assigned Adversary

1 Proceeding numbers 19-03008 and 20-03019; and consolidated pursuant to a stipulation among the
2 parties (the “**Consolidated Adversary Proceedings**”). The Consolidated Adversary Proceedings
3 include, in addition to JH Kelly’s claims against AECOM and PG&E, AECOM’s counterclaims
4 against JH Kelly and AECOM’s third-party claims against PG&E.

5 Pursuant to a joint request of the parties, the reference of the Consolidated Adversary
6 Proceedings was withdrawn from this Court to the U.S. District Court for the Northern District of
7 California, Oakland Division (Case No. 4:20-cv-05381-HSG), where it was consolidated with
8 another pending action by JH Kelly relating to the Project (*JH Kelly, LLC v. Ed Staub & Sons*
9 *Petroleum, Inc.*, Case No. 3:20-cv-08463 EMC).

10 PG&E answered JH Kelly’s claim against it in the Consolidated Adversary Proceedings and
11 asserted various defenses to JH Kelly’s claim against PG&E, but it did not assert any affirmative
12 claims for relief, counterclaims, or third-party claims against JH Kelly in the Consolidated
13 Adversary Proceedings.

14 **B. JH Kelly’s Proof of Claim and Participation in the Bankruptcy Cases**

15 On October 21, 2019 JH Kelly filed the Proof of Claim with the Bankruptcy Court. The
16 Proof of Claim asserted a secured claim of \$20,041,906.40 (secured by the JH Kelly Lien against
17 the Project assets) and an unsecured claim without priority of \$15,044,069.60, for a total claim as
18 of the Debtors’ bankruptcy petition date of \$35,085,976.00. JH Kelly believes that PG&E’s answer
19 to the claims in the Consolidated Adversary Proceedings constitutes an objection to the Proof of
20 Claim for purposes of Rule 3006, and that JH Kelly’s Proof of Claim may have been included in
21 one or more of the Debtors’ 115 separate omnibus claims objections, though JH Kelly’s counsel
22 has not identified a specific objection to the Proof of Claim filed in the Bankruptcy Cases.

23 There have been no substantive proceedings in the Bankruptcy Cases concerning the
24 allowance or disallowance of the JH Kelly Proof of Claim, apart from the litigation in the
25 Consolidated Adversary Proceedings.

26 On March 16, 2020 the Debtors filed the *Debtors’ and Shareholder Proponents’ Joint*
27 *Chapter 11 Plan of Reorganization Dated March 16, 2020* (Docket No. 6320), which was
28

1 subsequently amended on May 22, 2020 (Docket No. 7521) and June 19, 2020 (Docket No. 8048)
2 (as so amended, the “*Plan of Reorganization*”).

3 JH Kelly subsequently received a March 17, 2020 *Notice of Non-Voting Status to*
4 *Unimpaired Classes Presumed to Accept, or Creditors and Interest Holders Otherwise Not Entitled*
5 *to Vote on, the Debtors’ and Shareholder Proponents’ Joint Chapter 11 Plan of Reorganization.*
6 The Notice advised JH Kelly that it was not entitled to vote to accept or reject the Plan of
7 Reorganization with respect to its Proof of Claim, and JH Kelly accordingly did not vote on the
8 Plan of Reorganization. JH Kelly also did not object to confirmation of the Plan of Reorganization
9 or otherwise participate in the Debtors’ plan confirmation process.

10 The Plan of Reorganization was confirmed by this Court on June 20, 2020 (Docket No.
11 8053) and the effective date of the Plan occurred on July 1, 2020. *See Notice of Entry of*
12 *Confirmation Order and Occurrence of Effective Date of Debtors’ and Shareholder Proponents’*
13 *Joint Chapter 11 Plan of Reorganization Dated June 19, 2020* (Docket No. 8252).¹

14 JH Kelly has not received any payments or other distributions of any kind from PG&E with
15 respect to its Proof of Claim or its claims against PG&E in the Consolidated Adversary
16 Proceedings, whether under the Plan of Reorganization or otherwise.

17 Apart from filing its Proof of Claim in the PG&E Bankruptcy Case, its various filings in the
18 Consolidated Adversary Proceedings, and *JH Kelly LLC’s Motion for Relief from the Automatic*
19 *Stay* (Docket No. 5649) to permit JH Kelly to join PG&E as a party to the litigation between JH
20 Kelly and AECOM (which was resolved by stipulation with AECOM and PG&E; *see* Docket No.
21 6409),² JH Kelly has not participated in the Bankruptcy Cases.

23 ¹ Section 12.1 of the Plan provides for the dissolution of the Statutory Committees (*i.e.*, the
24 committees of unsecured creditors and of tort claimants appointed by the U.S. Trustee in the
25 Bankruptcy Cases pursuant to section 1102 of the Bankruptcy Code) on the Effective Date of the
26 Plan, subject to certain exceptions that do not appear applicable to this Motion. JH Kelly’s service
of this Motion on the Statutory Committees is therefore made in an abundance of caution, to avoid
any possible issue concerning the requested relief.

27 ² The Stipulation provides a full history of the Consolidated Adversary Proceedings from
28 January 2019 through the date of the Stipulation in March 2020.

1 **C. Resolution of the Consolidated Adversary Proceedings**

2 At this time the Consolidated Adversary Proceedings have been substantially resolved.
3 First, in April 2021, the U.S. District Court dismissed the JH Kelly Lien against the Project,
4 effectively disallowing the secured portion JH Kelly's Proof of Claim. Then, in December 2021,
5 AECOM and PG&E entered into a settlement agreement for the claims between them, leaving just
6 AECOM and JH Kelly as parties to the litigation. Finally, following a Judicial Settlement
7 Conference on June 3, 2022, JH Kelly, AECOM, and AECOM's insurers negotiated the terms of a
8 *Confidential Settlement Agreement and General Release* entered into and effective as of June 8,
9 2022 (the "**Settlement Agreement**") resolving all or substantially all of the issues between JH Kelly
10 and AECOM in the Consolidated Adversary Proceedings.³ The parties filed a Joint Notice of
11 Settlement regarding the claims between them on June 9, 2022 and have filed or will soon file a
12 Stipulation for Dismissal of the Consolidated Adversary Proceedings.

13 The Settlement Agreement further requires JH Kelly to prepare and file all necessary
14 documentation to effect the release and/or withdrawal of its Proof(s) of Claim filed in the
15 Bankruptcy Cases. This Motion implements the latter term of the Settlement Agreement.

16 **III. REQUEST FOR RELIEF**

17 Pursuant to this Motion, JH Kelly requests permission to withdraw with prejudice its Proof
18 of Claim against PG&E, without imposing any other terms or conditions on the withdrawal.

19 **IV. ARGUMENT**

20 Rule 3006 of the Federal Rules of Bankruptcy Procedure ("Withdrawal of Claim; Effect on
21 Acceptance or Rejection of Plan") provides that:

22 A creditor may withdraw a claim as of right by filing a notice of withdrawal,
23 except as provided in this rule. If after a creditor has filed a proof of claim an
24 objection is filed thereto or a complaint is filed against that creditor in an adversary
25 proceeding, or the creditor has accepted or rejected the plan or otherwise has
26 participated significantly in the case, the creditor may not withdraw the claim except
 on order of the court after a hearing on notice to the trustee or debtor in possession,
 and any creditors' committee elected pursuant to §705(a) or appointed pursuant to

27 ³ As indicated by its title, the terms of the Settlement Agreement are expressly confidential,
28 but AECOM and the other parties to the Settlement Agreement have consented to the limited
disclosure of the settlement terms in this Motion.

1 §1102 of the Code. The order of the court shall contain such terms and conditions
2 as the court deems proper. Unless the court orders otherwise, an authorized
3 withdrawal of a claim shall constitute withdrawal of any related acceptance or
rejection of a plan.

4 Because PG&E may have filed an objection to JH Kelly's Proof of Claim in the Bankruptcy Cases
5 or may be deemed to have objected to the Proof of Claim through its answer to JH Kelly's complaint
6 in the Consolidated Adversary Proceedings, JH Kelly may be required to obtain permission from
7 the Court to withdraw the Proof of Claim. For the reasons set forth below, however, the Court
8 should permit JH Kelly to withdraw the Proof of Claim with prejudice, without imposing any other
9 terms or conditions relating to the withdrawal.

10 **A. The Court Should Permit JH Kelly to Withdraw its Proof of Claim.**

11 The general considerations to be taken into account when addressing a requested withdrawal
12 of claim under Rule 3006 are those applicable to analyzing a voluntary dismissal under Federal
13 Rule of Civil Procedure 41(a). *Resorts Int'l. Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d
14 1394, 1399 (9th Cir. 1995) (citing Advisory Committee Note to Rule 3006 in support of using
15 FRCP 41(a)(2) considerations). *See also In re 20/20 Sport, Inc.*, 200 B.R. 972, 976-78 (Bankr.
16 S.D.N.Y. 1996) and *In re Kaiser Group Intern., Inc.*, 272 B.R. 852, 855 (Bankr. D. Del. 2002)
17 ("[T]he same considerations used by courts analyzing voluntary dismissal under Federal Rule 41
18 should be used in determining the question of withdrawal under Bankruptcy Rule 3006."). Courts
19 have "broad equitable discretion" in this analysis under Rule 41, *Pontenberg v. Boston Scientific*
20 *Corp.*, 252 F.3d 1253, 1255-56 (11th Cir. 2001), and under Bankruptcy Rule 3006.

21 In exercising a bankruptcy court's discretion, the chief inquiry is whether the debtor will
22 suffer some legal prejudice if the claim is withdrawn. *In re Lowenschuss*, 67 F.3d 1394, 1399 (9th
23 Cir. 1995) (affirming reversal of Bankruptcy Court's denial of request for conditional withdrawal
24 of claim). Legal prejudice implicates the "rights and defenses available to the defendant in future
25 litigation." *Kaiser*, 272 B.R. at 855 (citing *Westlands Water Dist. v. U.S.*, 100 F.3d 94, 97 (9th Cir.
26 1996) (defining legal prejudice as "prejudice to some legal interest, legal claim or legal
27 argument")). "Legal prejudice is not satisfied by the inconvenience of facing a second lawsuit, loss
28 of choice of forum, loss of a tactical advantage, and dismissal at an early stage of the proceeding."

1 *In re County of Orange*, 203 B.R. 977, 982 (Bankr. C. D. Cal. 1996) (citing *Hamilton v. Firestone*
2 *Tire & Rubber Co., Inc.*, 679 F.2d 143, 145 (9th Cir. 1982); *Templeton v. Nedlloyd Lines*, 901 F.2d
3 1273, 1275–76 (5th Cir. 1990); *Westlands Water Dist. v. Patterson*, 900 F. Supp. 1304, 1311 (E.D.
4 Cal. 1995)); *see also* *Lowenschuss*, 67 F.3d at 1399-1400 (noting that mere prospect of a second
5 lawsuit does not constitute “plain prejudice” sufficient to deny dismissal of a claim). The burden
6 is on the party opposing withdrawal of the claim to show actual prejudice that would result from
7 permitting withdrawal. *See Kaiser*, 272 B.R. at 856; *In re County of Orange*, 203 B.R. at 982.

8 In deciding a motion to withdraw a proof of claim, courts may also consider factors such as
9 “diligence in pursuing withdrawal of the claim, undue vexatiousness, the extent the [claim] has
10 ‘progressed,’ duplication of litigation expense, explanation of the need to withdraw, delay in
11 prosecution of the [claim], prejudice to others and the importance of the claim to the reorganization
12 effort.” 9 Collier on Bankruptcy ¶ 3006.01 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed.
13 2011); *see also In re Varona*, 388 B. R. 705, 727 (Bankr. E. D. Va. 2008) (reciting non-exhaustive
14 list of Rule 41 factors relevant in deciding motion to withdraw a proof of claim, including “the
15 defendant’s effort and expense in preparing for trial” and “whether a dispositive motion is
16 pending”).

17 PG&E will suffer no prejudice from withdrawal of JH Kelly’s Proof of Claim, and there are
18 no extenuating circumstances that warrant a denial of JH Kelly’s Motion. There have been no
19 substantive proceedings in the Bankruptcy Court concerning the Proof of Claim any objection
20 thereto; JH Kelly has not “participated significantly” in the Bankruptcy Cases;⁴ and JH Kelly did
21 not vote on the Plan of Reorganization, or otherwise participate in the plan confirmation process,
22 and has received no distributions under the Plan on account of its Proof of Claim. There is simply
23 no reason not to allow JH Kelly to withdraw the Proof of Claim.

24
25 ⁴ JH Kelly’s motion for relief from stay does not constitute “significant participation” for
26 purposes of Rule 3006. *See In re Owens*, 455 B.R. 640, 646, n.9 (Bankr. W.D. Mich. 2011) (citing
27 *Maintainco, Inc. v. Mitsubishi Caterpillar Forklift Am., Inc. (In re Mid-Atlantic Handling Systems,*
28 *LLC)*, 304 B.R. 111, 124 (Bankr. D.N.J. 2003) (creditor’s filing of a motion “seeking to remand an
involuntarily removed case does not constitute ‘significant participation’ for purposes of
Bankruptcy Rule 3006”).

1 **B. The Court Should Not Impose any Terms or Conditions on Withdrawal of the Claim.**

2 An order granting withdrawal may include “such terms and conditions as the court deems
3 proper.” Fed. R. Bankr. P. 3006. “[C]ourts have generally limited the conditions as necessary to
4 alleviate actual prejudice or harm to the opposing party.” *Kaiser*, 272 B.R. at 856 (citing *Am. Nat'l*
5 *Bank & Trust Co. of Sapulpa v. Bic Corp.*, 931 F.2d 1411, 1412 (10th Cir. 1991); *Templeton v.*
6 *Nedlloyd Lines*, 901 F.2d 1273, 1274 (5th Cir. 1990)). For example, such conditions may include
7 providing for res judicata effect based on the parties’ intent in withdrawing the claim. *See Quincy*
8 *Mall, Inc. v. Parisian, Inc.*, 117 F. Supp. 2d 784, 787-88 (C.D. Ill. 2000) (finding that parties’ intent
9 in withdrawing fully litigated bankruptcy claim collaterally estopped claimant from raising
10 identical issues in new claims); *see also Klingman v. Levinson*, 831 F.2d 1292, 1296 (7th Cir. 1987)
11 (finding issue preclusion applicable based on the parties’ intent in entering a consent decree).

12 As a result of its settlement with AECOM, JH Kelly has voluntarily agreed that its
13 withdrawal of the Proof of Claim may be “with prejudice”. JH Kelly will not file a new proof of
14 claim against PG&E in the Bankruptcy Cases. Beyond that, no further terms or conditions are
15 warranted in connection with withdrawal of the Proof of Claim.

16 **V. RESERVATION OF RIGHTS**

17 Nothing herein is intended to or should be construed as waiver of any right of JH Kelly
18 under the Bankruptcy Code, California law, any other applicable law, or in any other proceeding,
19 if for any reason the Court denies the Motion or subjects withdrawal of the Proof of Claim to terms
20 or conditions that are unacceptable to JH Kelly in its sole discretion.

21 **VI. CONCLUSION**

22 The Settlement Agreement and proposed withdrawal of JH Kelly’s Proof of Claim are
23 entirely positive developments for PG&E, potentially relieving PG&E of any liability to JH Kelly
24 for a claim in excess of \$35 million. While Bankruptcy Rule 3006 clearly may require JH Kelly to
25 obtain permission from the Court to withdraw the Proof of Claim, and allows the Court to impose
26 conditions on withdrawal of the Proof of Claim, there is no good reason under the circumstances
27 to withhold such permission or to subject it to any terms or conditions beyond JH Kelly’s agreement
28 that withdrawal of the Proof of Claim shall be with prejudice against refiling.

1 For the foregoing reasons, JH Kelly respectfully requests that the Court grant JH Kelly
2 permission to withdraw the Proof of Claim with prejudice pursuant to the terms of the proposed
3 Order submitted herewith.

4 DATED: July 28, 2022.

STOEL RIVES LLP

5
6 /s/ Mario R. Nicholas

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